Supreme Court, U.S.
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No. 98-_____

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA, DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

ALEJANDRO GOMEZ, et al.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Florida

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Ex Post Facto Clause forbids applying later, more stringent statutory conditions for awarding inmates credit toward early release from prison due to overcrowding, when the law at the time their crimes were committed made award of early release credits discretionary.

II. Whether the Ex Post Facto Clause forbids increasing the threshold for award of overcrowding credits, or changing the statutory definition of "lawful" prison capacity after the date of an inmate's crime, thereby increasing the number of persons incarcerated before overcrowding credits would be awarded.

LIST OF PARTIES

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Alejandro Gomez

Alex David Goodwin

Jeffrey Lynn Hock

Steven Kivett

Harry K. Singletary, as former Secretary of the Department of Corrections, State of Florida

Michael W. Moore, as current Secretary of the Department of Corrections, State of Florida

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§947.146, Florida Statutes . ..... 2, *passim*

No. 98-____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

THE STATE OF FLORIDA,

Petitioner,

vs.

ALEJANDRO GOMEZ, et al.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Florida

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion by the Florida Supreme Court (App. A) was published at 24 Florida Law Weekly S33 (Fla. Dec. 24, 1998), *rehearing denied* May 20, 1999, but has not appeared in an official reporter.

JURISDICTION

The opinion below was a final decision by the Florida Supreme Court on December 24, 1998. Florida's motion for rehearing and clarification, which delayed rendition, was denied on May 20, 1999. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1), and this Court's Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Ex Post Facto Clause in Art. I, §10 of the United States Constitution provides: "No State shall ... pass any ... ex post facto Law[.]"

Several Florida statutes addressing early release from prison were mentioned in the opinion below: §944.598 (1983), §944.276 (1987), §944.277 (Supp. 1988), §944.278, and §947.146. (App. B).

STATEMENT OF THE CASE

Florida, like many States, experienced significant prison overcrowding in the 1970s and 1980s. To combat that problem Florida experimented with a number of programs, including an early-release program triggered when prison overcrowding reached certain levels. Based on lessons learned through hard experience, Florida modified its overcrowding early-release program several times. All of the programs left the awarding of early-release credits to the absolute discretion of the Secretary of the Department of Corrections.

As law in Florida, the decision below is dramatic. Thousands of the most serious felons now have an Ex Post Facto right to accrue overcrowding credits, even though award of such credits was discretionary when their crimes were committed; overcrowding did not occur until after the law changed; and many of those inmates have shown themselves to be dangerous and likely to commit more crimes upon release.

As a decision on a federal constitutional question relating to prison overcrowding, the decision below is troubling precedent throughout the country. If followed, it will hamstring the efforts

of states to respond to prison overcrowding in an informed and flexible manner. It will deepen confusion among the lower courts as to the proper application of the Ex Post Facto Clause to discretionary early-release programs. For these reasons, Florida seeks review of the decision below.

Florida's Early-Release Statutes

In 1983, the Florida Legislature created a Corrections Overcrowding Task Force to assess long-term solutions to prison overcrowding. Among its recommendations was the creation of an early release program that could act as a "safety valve" if the prison population could not be stabilized or predicted accurately.

Florida then experimented with four such programs. All had one thing in common—they did not make early release mandatory upon a prisoner's good behavior. Instead, award of early release credits depended upon the level of prison overcrowding and the discretion of the Secretary of the Department of Corrections or the Governor. These programs were:

• *Emergency Release.* Enacted as part of the Correctional Reform Act of 1983, this statute authorized the Emergency Release of inmates through the award of "gain time" if the overall prison population reached 98% of lawful capacity. The statute did not condition access to credits on the nature of the inmate's offense. *See* §944.598, Florida Statutes (1983). In 1986, the Legislature raised the threshold for awarding Emergency Release credits from 98% to 99% of capacity. *See* ch. 86-46, Laws of Florida, §1, 3; §944.598, Florida Statutes (Supp. 1986).

Although this program was in effect from 1983 through 1993, and contained discretionary and mandatory provisions,[1] it was never implemented. No prisoner ever received Emergency Release gain-time credits. *See* Blankenship v. Dugger, 521 So.2d 1097, 1098 (Fla. 1988). This statute, superceded by later laws, was formally repealed in 1993. *See* ch. 93-406, Laws of Florida, §32, 44.

• *Administrative Gain-Time*. At the same time the Florida Legislature raised the Emergency Release threshold from 98% to 99%, it authorized a new form of overcrowding credit known as Administrative Gaintime. Under this program, inmates could be awarded gaintime credits when the prison population reached 98% of lawful capacity, although certain violent and habitual offenders were not eligible to receive credits. The statute required the Secretary of the Department of Corrections to certify to the Governor when the population reached that mark. If the Governor acknowledged that certification in writing, it further provided "the secretary [of DOC] may grant up to a maximum of 60 days administrative gain-time" [e.s.] to most inmates. *See* ch. 87-2, Laws of Fla., §1,2,3; §944.276, Florida Statutes (1987). The statute placed no limit on the Secretary's exercise of that

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[1] §944.598, Fla. Stat. (1983), provided in relevant part:

> (1) The Department of Corrections shall advise the Governor of the existence of a state of emergency [when] ... the population of the state correctional system exceeds 98 percent of the lawful capacity[.] ... When the Governor verifies such certification by letter, the secretary shall declare a state of emergency.
>
> (2) Following the declaration of a state of emergency, the sentences of all inmates in the system who are eligible to earn gain-time shall be reduced by the credit of up to 30 days gain-time[.]

Note: The Governor was not required to declare the state of emergency triggering the reduction. *See* Gomez, App. at A24 (Wells, J., dissenting).

discretion.[2] In 1988, the Florida legislature repealed this program. *See* ch. 88-122, Laws of Florida, §6.

• *Provisional Credits.* This program, enacted in 1988, replaced the Administrative Gaintime program. *See* §944.277, Florida Statutes (Supp. 1988). The primary difference was the Provisional Credit program contained a longer list of types of offenders who were not eligible to receive credits. As with the Administrative Gaintime program, credits were awarded at the discretion[3] of the Secretary after the Governor acknowledged the Secretary's certification of overcrowding. In 1989, the Legislature added more types of offenders who were not eligible, but did not revoke credits already distributed. In 1992, the Legislature revoked all provisional credits granted to persons convicted for murder and murder-related offenses.[4] In 1993, the legislature repealed the statute and canceled all previously granted administrative and provisional credits. *See* ch. 93-406, Laws of Florida, §32, 44.

• *Control Release.* Enacted in 1989 by ch. 89-526, Laws of Florida, this program remains in place today. *See* §947.146, Florida Statutes. It initially authorized release of certain prisoners when a 97.5% threshold (later increased) was met. It differed from earlier programs in that it is administered by the

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[2] §944.276(1), Fla. Stat. (1987), provided in relevant part:
> Whenever the inmate population of the corrections system reaches 98 percent of lawful capacity ... the secretary may grant up to a maximum of 60 days administrative gain-time[.] [e.s.].

[3] §944.277, Fla. Stat. (Supp. 1988) provided in relevant part:
> Whenever the inmate population of the correctional system reaches 97.5 percent of lawful capacity ... the secretary may grant up to 60 days of provisional credits[.] [e.s.].

[4] Revocation of these credits was the subject of Lynce v. Mathis.

Parole Commission rather than the Department of Corrections; additional "bad risk" inmates are not eligible for release; release dates could be modified based on new information about the inmates; and release dates could be extended or advanced as prison overcrowding levels change. After January 18, 1991, the Parole Commission began making early release determinations under the control release program, and the Department ceased using the earlier programs.

The Facts of this Case and the Decision Below

Five inmates petitioned for writs of habeas corpus in the Florida Supreme Court. Each inmate had been convicted for a crime committed between September 1986 and September 1992. During and since that period, the Florida Legislature enacted a series of statutes awarding "emergency gaintime," "administrative gaintime," or "provisional credits" in order to release inmates due to prison overcrowding. (App., p. A1-A6).

By 1990, the statutes awarding emergency gaintime, etc. were repealed or superceded by the "Control Release Program." *See* §947.146, Florida Statutes (App. B). The control release program replaced the routinely-awarded--but legally discretionary--award of overcrowding credits with discretionary release criteria based on an inmate's criminal history, behavior in prison, etc. *See* Gomez, App., p. A7-8 (observing the control release program was different from previous programs because it "incorporated several of the more discretionary aspects of a traditional parole-type program ... to ensure that only the least dangerous inmates would be released early when prison overcrowding occurred"). [footnote omitted].

Hand in glove with changes to the criteria for early release were changes to prison capacity before "overcrowding" was reached. From 1986 through 1989, the threshold for awarding overcrowding credits changed from 98% to 99%, back to 98%

and then to 97.5% of lawful capacity. Since 1989, the threshold has generally increased. The present threshold is when the prison system reaches 99% to 100% of lawful capacity. (*See* App., p. A2-8, 25.)

Respondents committed their crimes in 1986 through 1992. They did not promptly reach DOC's custody. Respondent Gomez committed second degree murder in September 1986, but did not enter DOC's custody until March 1993. Respondent Goodwin committed DUI manslaughter in May 1989, but did not enter custody until April 1994. *See* Gomez, App., p. A9-10. It was during this time the laws changed.

After each Respondent entered DOC's custody, the prison system occasionally reached the respective threshold for awarding early release credits, had the earlier laws still been in effect. In the interim, however, Respondents had been found ineligible due to statutory increases in the threshold, repeal of the entire program for accruing credit, or ineligibility for control release due to the nature of their crimes. Thus, no Respondent was awarded credits. Below, no Respondent sought restoration of credits awarded but rescinded. *See* App., p. A6 & n.4, A8.

The Florida Supreme Court's decision, over one dissent, granted the Respondents' petitions. It relied heavily on Lynce v. Mathis, 519 U.S. 433 (1997) (state cannot retroactively cancel discretionary gain-time credits which were *already awarded*); and Weaver v. Graham, 450 U.S. 24 (1981) (state cannot retroactively cancel a gain-time credit program that *automatically* reduced the length of well-behaving inmates' sentences). The Florida Supreme Court was aware this case differed from Lynce, acknowledging that in Lynce the overcrowding credits had already been awarded, which made "it unnecessary to speculate about what might have happened." Gomez, App. at p. A12 (quoting Lynce, 519 U.S. at 446).

Therefore, the court reasoned, once earlier prison overcrowding thresholds were reached, inmates absolutely would have received credits had those thresholds not been repealed. *Id.* Further, "[a]lthough the Secretary might have had the discretion to refuse to award any type of overcrowding credits," the court "did not believe that the Ex Post Facto Clause gives the Secretary discretion to choose to allow the implementation" of the Control Release program in place of the earlier programs. *Id.* at App., p. A13.

The court observed another difference between this case and Lynce. There, "the issue was whether petitioners' credits should be restored" [e.o.]; here, the "issue is whether petitioners should receive overcrowding credits they would have received if the actual overcrowding mechanism which was in effect at the time of their offense had continued in effect." Gomez, App. at p. A12-13. Nevertheless, the court reasoned, Weaver made that difference irrelevant, as it prevented DOC from altering the basic gain-time program because doing so "constricts the inmate's opportunity to earn early release." Gomez, App. at p. A13, *quoting* Weaver, 450 U.S. at 35-36.

Finally, the court concluded the control release program constricted the petitioners' opportunity to earn early release compared to the earlier programs. Therefore, it granted the petitions and ordered the State to award overcrowding credits to Respondents as required by the overcrowding statutes in effect when Respondents committed their crimes. App., p. A14.

Justice Wells dissented. He noted Lynce was distinguishable because "the receipt of the subject credits [here] was not only speculative at the time of the petitioners' offenses but they were simply never awarded." Gomez, App., p. A21. Justice Wells also noted the Secretary of DOC never implemented the Emergency Release statute, and never exercised his discretion to award the other overcrowding credits during the time period in

question. He also cited two Fifth Circuit decisions which held, after Lynce, that "a proper ex post facto analysis still includes a determination of whether the sought-after early release opportunity is or was 'speculative.'" *Id.* at p. A23.

REASONS FOR GRANTING THE WRIT

The Florida Supreme Court Has Decided Important Questions of Federal Law That Have Not Been, But Should Be, Settled By This Court.

Introduction

The lower court decision severely limits the rights of States to adjust their early-release programs based on experience and changed conditions. This result cuts deeply into the States' core interest in the administration of their prisons. *See* Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973). It is inconsistent with the principle that "prison authorities are best equipped to make difficult decisions regarding prison administration." Washington v. Harper, 494 U.S. 210, 223-24 (1990).

To be sure, as Weaver v. Graham and Lynce v. Mathis confirm, the Ex Post Facto Clause is an important constraint on States' power in this area. But the Florida Supreme Court's decision goes far beyond those two decisions. In doing so, it imposes new limitations on administration of early release programs and legal changes to prison capacity.

The decision below can best be understood in two parts, each generating a question warranting certiorari review. The first part held the Ex Post Facto Clause forbade the State from substituting the "Control Release Program" for the "statutory overcrowding programs in effect at the time of the petitioners' offenses." (App., p. A2). The second part reached the same holding as to the definition of "lawful [prison] capacity;" which, in turn,

determines when the prison system is overcrowded and credits may be awarded: "We agree that the legislature may change the definition of prison overcrowding; however, ... the Department cannot apply the definition retrospectively to inmates whose offenses were committed prior to the effective date of the change." Gomez, App. at p. A18. As a result, the two questions presented asddress the erroneous conclusions drawn by the Florida Supreme Court in holding that the circumstances in Gomez violates Lynce, and the *Ex Post Facto* clause of the United States Constitution.

I. Whether the ex Post Facto Clause Forbids Applying Later, More Stringent Statutory Conditions for Awarding Inmates Credit Toward Early Release from Prison Due to Overcrowding, When the Law at the Time Their Crimes Were Committed Made Award of Early Release Credits Discretionary.

In the opening paragraph of Gomez, the Florida Supreme Court broadly declared it had to grant the habeas corpus petitions "because the substitution of the Control Release Program by the State for the statutory overcrowding programs in effect at the time of the petitioners' offenses improperly curtailed the availability of future credits [toward early release]." (App., p. A-2.).

Read in isolation, the above statement superficially conforms to this Court's precedent. Read in the context of the facts and prior law, it is manufactured jurisprudence. It ignores the Secretary of DOC's total discretion in awarding (or not) overcrowding credits under prior early release programs. As the Florida Supreme Court itself noted:

> While we agree ... *the Secretary might have had the discretion to refuse to award* any type of

> overcrowding credits, we do not believe that the Ex Post Facto Clause gives the Secretary the discretion to choose to allow the implementation of the later, more onerous Control Release statute to these inmates in place of the statutes which were in effect at the time of their offenses. [underline original; italics added].

Gomez, App., p. A13.

DOC respectfully suggests the court below used the word "might" to circumvent the obvious: The Governor and the Secretary had statutory discretion to deny credits to all inmates--risking, perhaps, federal court intervention upon reaching the population cap imposed by Costello v. Wainwright, 397 F.Supp. 20 (M.D. Fla. 1975), *aff'd.* 525 F.2d 1239 (5th Cir. 1976). Denying credits to Respondents, albeit under the auspices of the later-enacted control release program, treats them no differently than they could have been treated under the law at the time they committed their crimes. Since overcrowding credits were legally discretionary when Respondents committed their crimes, Respondents could have no reasonable expectation of early release through such credits; in fact, such credits were never awarded. The Ex Post Facto Clause simply does not protect such speculative interests. *See* California Dept. of Corrections v. Morales, 514 U.S. 499, 115 S.Ct. 1597, 1605 (1995) (upholding against ex post facto challenge a California statute increasing interval between parole hearings, as the statute created "only the most speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes").

The dissent below looms large:

> [P]etitioners were not in the custody of the Department at the time that such credits were

> being awarded. To give the petitioners prison overcrowding reduction credits when they were not even in prison during the time frame in which such credits were being awarded is to engage in a purely fictionalized scenario of what the petitioners might have received if they had been where they were not. I do not believe the United States Supreme Court intended for us to engage in such fantasy. [footnote omitted]

Gomez, App., p. A21 (Wells, J., dissenting). Justice Wells then contrasts this case with Weaver; Calamia v. Singletary, 117 S.Ct. 733 (1997); and Lynce. *Id.* at A21-23. Unable to improve Justice Wells' analysis, DOC adopts it as further grounds for certiorari review.

Specifically, the dissent cited two recent Fifth Circuit cases for the proposition a proper ex post facto analysis still requires consideration of whether the opportunity for early release was or is "speculative." *See id.*, *citing* Wottlin v. Fleming, 136 F.3d 1032 (5th Cir. 1998), (categorical determination by the Texas Bureau of Prisons that it would not exercise discretion to release certain inmates not violative of Ex Post Facto Clause when inmates' early release was always within the bureau's "broad discretion"); and Hallmark v. Johnson, 118 F.3d 1073 (5th Cir.), *cert. den.* 118 S.Ct. 576 (1997) (same, declining to extend Lynce to invalidate a Texas directive removing a corrections official's discretion to restore good-time credits when that official previously had discretion as to whether to restore credits).

The Fifth Circuit decisions are doubly significant. First, they show the decision below is not in accord with other recent appellate decisions, so that the question presented here does need settling through a decision by this Court. Second, by virtue of the fact both cases arose in Texas, the decisions show the legal

issues here are important beyond Florida. Indeed, Texas is a very populous state with a large prison system.

The majority was led astray by its failure to recognize the Governor and the Secretary's discretion under the older release statutes in effect when Respondents committed their crimes. The majority compounded its failure by not distinguishing between the language of those statutes and the way they were administered until enactment of the control release program. *See* Gomez, at App., p. A6 ("It is very significant that the award of credits under both Administrative Gain Time and Provisional Credits programs was administered pursuant to a computer program without an individual review of inmate records." [e.s.]).

Under §944.598 (the 1983 emergency release statute), credits were to be awarded only if the Governor verified a state of emergency due to prison overcrowding. The statute did not require the Governor to do so; thus, award of credits under this law was discretionary. (*See* footnote 1 herein.) Award of credits under the administrative gain time and provisional credits was made even more discretionary, as both statutes declared the Secretary "may" award gaintime or credits after a given threshold was reached. (*See* footnotes 2 and 3 herein.)

Not until the Secretary of DOC exercise discretion to award gaintime or credits at all, were the statutes effectuated "without individual review of inmate records." The absence of individual review ceased when the Parole Commission implemented the control release program. Respondents, and the majority below, would find an ex post facto right based on DOC's practice--once discretion was exercised, to award credits to all eligible inmates--rather than the statutes themselves.

Thus, the lynchpin of the decision below fails. The substitution of the control release program for the threshold

approach in earlier overcrowding statutes did not "curtail[] the availability of future credits." Gomez, App., p. A4. Under the earlier laws, the award of credits was always totally discretionary--it was exercised without review of individual records. The control release program simply replaces this practice with the more discerning factors of the control release program. Since, under the earlier statutes, Respondents could have been denied early release credits altogether, application of the control release statute did not increase their punishment.

The decision below leads to bizarre results not constitutionally required; results the dissent described as "fantasy." Florida's prison system has expanded substantially since Respondents committed their crimes. For example, Respondent Gomez committed second degree murder in 1986. Before he reached prison, the overcrowding statutes changed, to preclude him from receiving credits. Now, under the decision below, he can claim the benefit of the overcrowding threshold in effect 13 years ago, even though there is no real overcrowding now. For all others similarly situated, DOC must effectively pretend the prison system is smaller than it is, and retroactively award overcrowding credits while there is no overcrowding. Real prison capacity--the subject of the second holding below--is ignored.

II. Whether the ex Post Facto Clause Forbids Increasing the Threshold for Award of Overcrowding Credits or Changing the Statutory Definition of "Lawful" Prison Capacity after the Date of an Inmate's Crime, Thereby Increasing the Number of Persons Incarcerated Before Overcrowding Credits Would Be Awarded.

DOC adopts its argument above. By itself, a statutory change increasing "lawful capacity" of the prison system creates only the most speculative and attenuated possibility that any particular

inmate will be released early. Moreover, at the time an inmate commits a crime, he has no reasonable expectation the prison system would reach any particular threshold triggering early release.

The Florida Supreme Court's reasoning bears repeating:

> We conclude that the definition of overcrowding, as it was defined at the time of the inmate's offense, is part and parcel of the relevant version of the overcrowding statute that should be applied to each inmate. We agree that the legislature may change the definition of prison overcrowding; however, since that change as proven by the Department's charts can drastically reduce or even eliminate the credits an inmate might have received under the prior definition, the Department cannot apply the definition retrospectively to inmates whose offenses were committed prior to the effective date of the change.

Gomez, at App., p. A16.

The thresholds applicable to Respondents were always expressed as a percentage of total prison capacity. When each Respondent committed his crime, there was no absolute numerical limit on the number of inmates which the State could house, assuming it was willing to build new prisons as necessary. No court has held the Ex Post Facto Clause prevents a state from physically increasing prison capacity beyond what existed at any prior date.

Nevertheless, the decision below holds Florida could not increase the number of inmates held within existing facilities by

changing the statutory definition of "lawful capacity." In effect, the Florida Supreme Court has held a convicted criminal has an ex post facto right against an increase in the number of legally available prison beds above those available when the crime was committed.

This, too, is "fantasy." After all, by physically expanding the prisons, Florida prevented overcrowding thresholds from being reached just as surely as it did by statutorily increasingly "lawful" capacity to 150% (from 133%) of optimal or "design" capacity. Finding an ex post facto right against increases in the available prison beds is a far greater windfall than the one the Court below feared. *See* Gomez, App., p. A14 n. 10) (directing that inmates eligible for more than one type of credit "should not be awarded duplicate (or double) credits for the same time period").

CONCLUSION

This Court can safely assume prison overcrowding is not a problem confined to Florida. This Court can assume, with equal safety, that other states modify their overcrowding statutes to prevent premature release of the more dangerous criminals. These states will be quite surprised and disappointed to learn the Ex Post Facto Clause requires application of superceded statutes, based on the date crimes were committed, even though the superceded statutes were discretionary. Particularly troublesome is application of the Ex Post Facto Clause in situations such as this case, in which inmates were not in custody for years after their crimes were committed; and the fictional overcrowding occurred after the early release statutes had been superceded by the more discerning control release program.

Florida also submits that federal and other state governments increase actual and "lawful" prison capacity when needed. These

governments would be quite surprised to learn inmates have an ex post facto right against increases in the number of available prison beds above what were available when crimes were committed. This Court should grant certiorari to answer the questions posed above.

Respectfully submitted,

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June, 1999

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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[PETITIONER'S APPENDIX A]

Supreme Court of Florida

THURSDAY, MAY 20, 1999

ALEJANDRO GOMEZ,
Petitioner,
vs. CASE NO. 90,654
HARRY K. SINGLETARY, JR., etc.,
Respondent.

ALEX DAVID GOODWIN,
Petitioner,
vs. CASE NO. 90,655
HARRY K. SINGLETARY, JR., etc.,
Respondent.

STEVEN KIVETT,
Petitioner
vs. CASE NO. 90,759
HARRY K. SINGLETARY, JR., etc.,
Respondent.

JEFFREY LYNN HOCK,
Petitioner,
vs. CASE NO. 90,829
HARRY K. SINGLETARY, JR., etc.,
Respondent.

GIOVANNI GALVIS,
Petitioner,

vs. CASE NO. 90,642

HARRY K. SINGLETARY, JR., etc.,
Respondent.

The Motion for Rehearing and Clarification filed by Respondent Harry K. Singletary, Jr., is denied and the Petitioners' Consolidated Motion for Rehearing is also denied in light of the revised opinion. The proposed specific relief calculations for Petitioners Gomez, Goodwin, Kivett, Hock, and Galvis, filed by Respondent Harry K. Singletary, Jr., are approved except that Petitioner Hock shall be credited with 48 additional Provisional Credits for the month of August 1994. The Court hereby adopts the Respondent's proposed relief charts for only those Offender Groups represented in this case (Groups 3-5). A revised version of the Offender Groups relief chart is hereby incorporated into the revised opinion as Appendix B. The original appendix (now Appendix A) is revised in accordance with both the Petitioner's motion and the Respondent's motion to indicate that Petitioner Galvis is entitled to 30 days of Emergency Gain Time. No further motions for rehearing will be considered. Respondent's Motion to Stay Upon Disposition of Motion For Rehearing And Clarification is granted and proceedings in this Court are stayed to and including June 21, 1999, to allow the Respondent to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

[attestation, etc. omitted]

Supreme Court of Florida

ALEJANDRO GOMEZ,
Petitioner,
vs.
HARRY K. SINGLETARY, JR. etc.,
Respondent.

ALEX DAVID GOODWIN,
Petitioner,
vs.
HARRY K. SINGLETARY, JR. etc.,
Respondent.

STEVEN KIVETT,
Petitioner,
vs.
HARRY K. SINGLETARY, JR. etc.,
Respondent.

JEFFREY LYNN HOCK,
Petitioner,
vs.
HARRY K. SINGLETARY, JR. etc.,
Respondent.

GIOVANNI GALVIS,
Petitioner,
vs.
HARRY K. SINGLETARY, JR. etc.,
Respondent.

Nos. 90,642, 90,654, 90,655,
90,759 & 90,829
[December 24, 1998]

REVISED OPINION

OVERTON, J.

This case concerns the consolidated petitions for writ of habeas corpus filed by petitioners Alejandro Gomez, Alex David Goodwin, Steven Kivett, Jeffrey Lynn Hock, and Giovanni Galvis. We have jurisdiction pursuant to Article V, section 3(b)(9) of the Constitution of Florida. We find that United States Supreme Court decisions mandate that we grant the petitions. We must do so because the substitution of the Control Release Program by the State for the statutory overcrowding programs in effect at the time of the petitioners' offenses improperly curtailed the availability of future credits. Consequently, under Weaver v. Graham, 450 U.S. 24 (1981), as reaffirmed in Lynce v. Mathis, 519 U.S. 433 (1997), this action constituted a violation of the Ex Post Facto Clause of the United States Constitution. See U.S. Const. art I, § 10. We note that this case is clearly distinguishable from Meola v. Department of Corrections, Nos. 89,982, 90,148 & 90,241 (Fla. Dec. 24, 1998), and Thomas v. Singletary, Nos. 90,128 & 90,188 (Fla. Dec. 24, 1998), in which we are denying relief.[5]

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[5] In Meola v. Department of Corrections, we address gain time in the context of prisoners who had their Administrative Gain Time and/or Provisional Credits canceled. We hold that the petitioners are not entitled under ex post facto principles to the reinstatement of the overcrowding credits that they had actually been awarded, but which were subsequently canceled. We also hold that the petitioners were accorded due process in the cancellation of the credits and that there was no equal protection violation.

In Thomas v. Singletary, Nos. 90,128 & 90,188 (Fla. Dec. 24, 1998), we address the extension and then cancellation of prisoner's release dates under the Control Release program. We hold that since inmates were always on notice that their control release dates could be changed to a later date, the legislative amendments to the program and, ultimately, the cancellation of their release dates did not result in an ex post facto violation.

In State v. Lancaster, No. 86,312 (Fla. Dec. 24, 1998), in which we are granting relief, we address gain time in the context of prisoners who had their Administrative Gain Time or Provisional Credits forfeited upon revocation of

I. The Various Overcrowding Programs

Since the early 1970s, Florida has had a severe prison overcrowding problem which has resulted in the closing of Florida's prison system several times. See Costello v. Wainwright, 397 F. Supp. 20, 22 (M.D. Fla. 1975), aff'd 525 F.2d 1239 (5th Cir. 1976). In 1980, the Florida Department of Corrections (the Department) entered into a consent decree that provided for the capping of the prison population within certain limits. Id.

As explained below, over the years, the legislature enacted a maze of overcrowding gain time statutes with differing names and requirements. Pursuant to the consent decree in Costello, and as a part of the Correctional Reform Act of 1983, the legislature enacted the Emergency Gain Time statute. See § 944.598, Fla. Stat. (1983). The Emergency Gain Time statute was the first overcrowding gain time statute. It became effective on June 16, 1983. However, under those provisions, the statute did not become operative until prison overcrowding surpassed 98% of lawful capacity (the triggering percentile threshold). Effective June 2, 1986, the triggering percentile threshold was increased to 99% capacity. See ch. 86-46, § 1, 3, at 166, 168, Laws of Fla.; § 944.598, Fla. Stat. (Supp. 1986).

The Emergency Gain Time statute was superseded by the enactment of the Administrative Gain Time statute. See § 944. 276, Fla. Stat. (1987). This statute went into effect on February 5, 1987. See ch. 87-2, § 1, 2, 3, at 3-4, Laws of Fla. While the Emergency Gain Time statute technically remained in effect, the Administrative Gain Time statute effectively superseded the

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probation. We hold that the State has statutory authority to forfeit their credits, but only for criminal offenses committed after a certain date and that the 1993 statute called the Safe Streets Initiative cannot be used to cancel their gain time as concerns inmates who were released on supervision before its enactment.

While each of these opinions are similar because they discuss the effect that the United State's Supreme Court decision in Lynce v. Mathis, has had on gain time caselaw, they are clearly distinguishable, as discussed above.

Emergency Gain Time statute because the Administrative Gain Time had a triggering percentile threshold of 98%, which was lower than the 99% threshold of the Emergency Gain Time statute. The State never implemented the Emergency Gain Time statute, so no Emergency Gain Time was ever awarded. See Blankenship v. Dugger, 521 So. 2d 1097, 1098 (Fla. 1988). The Emergency Gain Time statute was repealed effective June 17, 1993. See ch. 93-406, §§32, 44, at 2966, 2974, Laws of Fla. (reflected in the Table of Repealed and Transferred Sections (only) - Index at D-97, Fla. Stat. (1993)).

The Department of Corrections (hereafter the Department) made its first overcrowding awards under the Administrative Gain Time statute in February of 1987. It awarded a total of 720 days of Administrative Gain Time to individual prisoners between February of 1987 and June 30, 1988. Effective July 1, 1988, the Administrative Gain Time statute was repealed[6] and the Provisional Credits statute took its place, with a triggering percentile threshold of 97.5. See § 944.277, Fla. Stat. (Supp. 1988); ch. 88-122, § 5, at 535-37, 572, Laws of Fla.

The Provisional Credits statute was in effect from July 1, 1988, through June 16, 1993. During this time the Department awarded a total of 1860 days of Provisional Credits to individual prisoners between July 1988 and January 18, 1991. It is very significant that the award of credits under both Administrative Gain Time and Provisional Credits programs was administered pursuant to a computer program without an individual review of inmate records. It proved to be unpopular both with the public and with state officials because several notorious early releasees committed new violent crimes.

In an effort to provide a better, more tailored method of reducing prison overcrowding, the Control Release Program was enacted by the legislature, effective September 1, 1990, with a triggering percentage threshold of 97.5%. See § 947.146, Fla.

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[6] See ch. 88-122, § 6, at 537, Laws of Fla.

Stat. (1989); ch. 89-526, §§ 1, 2, 52, at 2659-61, 2690, Laws of Fla. At the same time that the Control Release program was created, the threshold for the Provisional Credits program was increased to 98%. Id. Although Control Release was similar to the Provisional Credits statute because it provided for the award of overcrowding allotments which advanced the inmate's release date, it was different in several respects. First, the Control Release program was administered by the Parole Commission, sitting as the Control Release Authority, rather than the Department. See § 947.146(1), Fla. Stat. (1989). Second, Control Release allotments were not awarded across-the-board to all eligible inmates based a computer program, as was done with the prior programs. Third, even if inmates were statutorily eligible for Control Release consideration, some inmates' release dates were not advanced as allotments were awarded, because they had been assigned a "non-advanceable" control release date. See § 947.146(2), Fla. Stat. (1989); Fla. Admin. Code R. 23-22.006-22.008. The Commission assigned "non-advanceable" control release dates to inmates it considered to be bad release risks to the community, taking into consideration such things as the prior number and type of convictions and prior behavior on supervision, as well as the discretionary consideration of aggravating and/or mitigating factors, including victim input. See § 947.146(5), Fla. Stat. (1989); Fla. Admin. Code R. 23-22.006-22.008. In addition, control release dates could be modified based on new information tending to indicate an inmate's negative or increased release risk prognosis. Moreover, inmate release dates could be extended or advanced, i.e., allotments could be given or taken away, as the prison overcrowding levels changed. See § 947. 146(6), Fla. Stat. (1989); Fla. Admin. Code R. 23-22.010. In sum, while Control Release was similar to the previous programs because it provided for reduced sentences, it was different because it incorporated several of the more

discretionary aspects of a traditional parole-type program.[7] In many ways, the Control Release program was better than the previous programs because it helped to ensure that only the least dangerous inmates would be released early when prison overcrowding occurred.

On January 18, 1991, the Department stopped awarding overcrowding credits under the 98% triggering threshold of the prior credits program because the Commission was awarding allotments when the 97.5% percentage threshold was reached.

In 1993, the legislature repealed the Provisional Credits statute. See § 944.278, Fla. Stat. (1993)(note 2); ch. 93-406, §§ 32, 44, at 2966, 2974, Laws of Fla. Then, between 1993 and 1995, the legislature progressively increased the percentage threshold for Control Release. In addition, during several periods of time, beginning in 1993, prison overcrowding exceeded all of the prior thresholds. See § 947.146(2), Fla. Stat. (1993); § 947.146(2), Fla. Stat. (Supp. 1994).

At the time of their offenses, all five petitioners were eligible for prison overcrowding credits (either Emergency Gain Time, Administrative Gain Time, or Provisional Credits). However, by the time all but petitioner Hock had reached the Department's custody, the petitioners had already either been made effectively ineligible, or the entire program had been repealed. Accordingly, petitioners Galvis, Kivett, Gomez, and Goodwin were never

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[7] See, e.g., §§ 947.165, 947.173, 947.174, Fla. Stat. (discussing Parole Commission's duties to periodically review and revise inmate parole dates).

awarded any overcrowding credits.[8] The following is a summary of the five slightly different scenarios of each of the petitions:

Petitioner Galvis was convicted of a drug trafficking offense committed on September 24, 1992. At that time, several programs were in effect: the Emergency Gain Time statute, with a threshold of 99%; the Provisional Credits program, with a threshold of 98%; and the Control Release program, with a threshold of 97.5%. Galvis was eligible for Emergency Gain Time, but ineligible for any other credits until after he had finished serving the fifteen-year mandatory minimum.[9]

Petitioner Kivett was convicted of manslaughter committed on October 18, 1987. At that time the following overcrowding programs were in effect: the Emergency Gain Time program, with a threshold of 99%; and the Administrative Gain Time program, with a threshold of 98%. Kivett was eligible for both of those programs. Kivett was offense-eligible for Control Release consideration but after consideration, the Commission found Kivett to be a release risk and assigned him a non-advanceable date. This designation meant that when the Commission awarded allotments (days), they did not affect Kivett's actual release date. See § 947.146(2), Fla. Stat. (1989); Fla. Admin. Code R. 23-22.006-22.008.

Petitioner Gomez was convicted of a second-degree murder committed on September 11, 1986. At that time, the only

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[8] Hock was awarded 360 days Provisional Credits but those credits were subsequently cancelled. In Calamia v. Singletary, 686 So. 2d 1337 (Fla. 1996), we affirmed that cancellation. That decision, however, was vacated by the United States Supreme Court in Calamia v. Singletary, 117 S. Ct. 1309 (1997). On remand, we granted Hock's petition in light of the United States Supreme Court decision in Lynce v. Mathis, 519 U.S. 433 (1997). See Calamia v. Singletary, 694 So. 2d 733 (Fla. 1997). The Department has now restored Hock's 360 days of Provisional Credits, but has not released him. In this case, Hock is seeking the award of credits he was never awarded.

[9] We have been informed by the Department that Galvis' prison sentence is made up entirely of a mandatory sentence.

overcrowding program in effect was the Emergency Gain Time program, with a threshold of 99%. Gomez was eligible under that statute. However, the Department did not receive custody of Gomez until March 9, 1993. At that time, overcrowding allotments were being awarded under the Control Release program and Gomez was not eligible for Control Release.

Petitioner Goodwin was convicted of a DUI manslaughter committed on May 6, 1989. At that time, the Emergency Gain Time statute was in effect with a threshold of 99%; the Provisional Credits statute was also in effect, with a threshold of 97.5%; and Goodwin was eligible for those programs. However, Goodwin was not received into the Department's custody until April 28, 1994, which was after the Provisional Credits program had been repealed. Goodwin, like Kivett, was offense-eligible for Control Release consideration, but was deemed to be a release-risk and assigned a non-advanceable date.

Petitioner Hock was convicted of a second-degree murder committed on October 1, 1988. At that time the following programs were in effect: the Emergency Gain Time statute, with a threshold of 99%, and the Provisional Credits statute with a threshold of 97.5%. Hock was eligible for both those programs and received 360 days of Provisional Credits between May 1990 and January 18, 1991. After that date, overcrowding allotments were awarded pursuant to the Control Release program and Hock was ineligible for that program. Hock's 360 days of Provisional Credits were canceled in 1993, but restored in 1997, as explained in footnote 4.

In this case, the petitioners argue that under Weaver v. Graham, 450 U.S. 24 (1981), as reaffirmed in Lynce, they should have been awarded overcrowding gain time credits because, at the time of their offenses, they were eligible for at least one of the various versions of overcrowding gain-time credits. Except for Hock, they were never awarded any overcrowding credits because such credits were no longer available to them by the time they entered the Department's custody and they were effectively ineligible for Control Release. They allege that they

are entitled to relief because the statutes which were enacted after their offenses were more onerous than the ones in effect at time of their offenses and the application of those statutes resulted in their having to serve longer sentences. They assert that not only should they have been awarded either Emergency Gain Time, Administrative Gain Time or Provisional Credits, but the State should not have been able to make them effectively ineligible for any type of overcrowding credits by substituting the Control Release Program for the prior programs. They further assert that prison overcrowding continued for a number of years even after the substitution of the Control Release program. They conclude, therefore, that all the petitioners should have received and continued receiving either Emergency Gain Time, Administrative Gain Time or Provisional Credits (as the case may be) until late 1994 or even later.

The State argues that the petitioners are not entitled to these credits and argues that the United States Supreme Court's decision in Lynce only requires the reinstatement of credits for those inmates who actually received credits which were subsequently cancelled. Since these inmates never received any overcrowding credits[10] the State asserts that they are not entitled to any credits. The State further argues that even if the prior programs had not been repealed or replaced, Secretary Singletary would not have exercised his discretion to implement them because it was clear that the Control Release program was a much better way to ensure that only the least dangerous inmates were released early when prison overcrowding reached crisis proportions.

II. Analysis under Lynce v. Mathis

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[10] As noted previously, none of the petitioners, with the exception of Hock, received any credits. Hock received 360 days Provisional Credits and has already had those credits restored. In this case, Hock is seeking additional credits that he never received.

In Lynce, petitioner Lynce argued that, like regular gain time,[11] prison overcrowding credits could constitute part of an inmate's sentence because a "prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." Lynce, 519 U.S. at 445-46 (quoting Weaver v. Graham, 450 U.S. 24, 32 (1981)). The State argued that with prison overcrowding credits, the above-mentioned reliance argument was not present because at the time of the plea bargain and sentencing, the petitioner could not have reasonably expected to receive any such credits given that the State could have alleviated the prison overcrowding problem by other means by the time the inmate reached prison. Accordingly, the State argued, unlike regular gain time, the existence or amount of prison overcrowding is always speculative. The United States Supreme Court found this argument unpersuasive in Lynce's case because "the actual course of events [made] it unnecessary to speculate about what might have happened." Lynce, 519 U.S. at 446. Stated another way, in Lynce, no one had to "speculate" about whether the contingency of the relevant prison overcrowding threshold might be reached during Lynce's incarceration so as to allow for such awards because it was reached during Lynce's incarceration, and he was awarded a specific number of Provisional Credits. The Court, therefore, made clear that, for ex post facto purposes, there is no difference between regular gain time and prison overcrowding gain time.

In this case as well, there is no need to engage in such speculation because prison overcrowding did reach the relevant percentages in 1993 and but for the effective repeals of the earlier programs, the petitioners would have received credits and their sentences would have been reduced.

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[11] Regular gain time awards (incentive and basic gain time) are determined in part by the date of offense, the type of offense and the inmate's behavior. The amount of regular gain time awardable is not statutorily tied to the amount of prison overcrowding. See generally § 944.275, Fla. Stat. (1997).

There is a distinction, however, between this case and Lynce. In Lynce, the issue was whether the petitioners' credits should be restored. In this case, the issue is whether the petitioners should receive the overcrowding credits they would have received if the actual overcrowding mechanism which was in effect at the time of their offense had continued in effect. In other words, in this case, there was no cancellation of overcrowding credits already awarded. Accordingly, it is at least arguable that the circumstances present in Lynce are not present here. Nevertheless, the Lynce Court specifically relied on and cited extensively to Weaver v. Graham, 450 U.S. 24 (1981), which is quite similar to this case.

In Weaver, the Department attempted to alter the manner of awarding basic and incentive gain time which resulted in a reduction in the availability of gain time. The Supreme Court found that because "the new provision constricts the inmate's opportunity to earn early release, [it] thereby makes more onerous the punishment for crimes committed before its enactment. This result runs afoul of the prohibition against ex post facto laws." Weaver, 450 U.S. at 35-36 (emphasis added). This case is similar because the substituted overcrowding program (Control Release) significantly constricted the petitioners' opportunity to earn early release under the prior statutory provisions by making them effectively ineligible.

As mentioned above, the Department asserts that the petitioners are not entitled to relief because Secretary Singletary would not have exercised his discretion under the Provisional Credits statute to continue to award Provisional Credits, because he felt that the Control Release program was a better program. While we agree that the Control Release program certainly seems to have been better designed to ensure public safety and that the Secretary might have had the discretion to refuse to award any type of overcrowding credits, we do not believe that the Ex Post Facto Clause gives the Secretary the discretion to choose to allow the implementation of the later, more onerous Control

Release statute to these inmates in place of the statutes which were in effect at the time of their offenses.

Accordingly, we are compelled by the United States Supreme Court's decision in Lynce to conclude that for these inmates, the substitution of the Control Release program for the earlier programs resulted in an ex post facto violation under Weaver.

Our decision today is consistent with our recent decision in Britt v. Chiles, 704 So. 2d 1046 (Fla. 1997). In that case, this Court rejected the State's argument that a change in the gain time forfeiture statute which increased the amount of gain time forfeitable was not subject to the Ex Post Facto Clause because it was too contingent upon future events. This Court granted the petition because the statute "eliminate[d] an inmate's opportunity to earn incentive gain-time" for a certain amount of time after a disciplinary infraction was committed. Britt, 704 So. 2d at 1047-48. This Court specifically likened the situation in Britt to that in Weaver, because by reducing the ability to earn gain time after a disciplinary infraction, the Department was essentially "curtailing the availability of future credits [and therefore] it effectively postpone[d] the date when [an inmate] would become eligible for early release." Britt, id. at 1046-47 (first brackets added)(quoting Lynce, 519 U.S. at 442). Accordingly, we grant the instant consolidated petition and order the Department to apply the version of the overcrowding statute in effect at the time of each petitioner's offense.

III. The Remedy

The Department has provided detailed charts showing the actual prison population over the years as compared to the relevant lawful capacity levels. The difference between these numbers is the amount of overcrowding present during the pertinent years. The Department also set forth charts presenting several possible ways of providing for the award of credits were we to grant the petition. The Department has made its calculation based both on the actual levels of prison overcrowding and on certain data projections for time periods for which the Department does not have actual numbers.

The petitioners contest the Department's proposed relief because they argue that the use of the Control Release statute to reduce prison overcrowding by releasing the less risky inmates reduced the actual level of prison overcrowding, thereby reducing the amount of credit now due to the petitioners.

We conclude that if the legislature had maintained the percentage threshold for Control Release at below 97.5%, by releasing the less dangerous inmates on Control Release at that lower level, that action would probably have prevented the overcrowding levels from reaching the higher threshold levels. If those thresholds had not been reached, the required percentage contingency would not have come into fruition and there would probably have been no ex post facto violation.[12] Due to the later increases in the Control Release thresholds, however, prison overcrowding periodically did exceed the relevant threshold levels in 1993 and onward for a number of years. Nevertheless, to the extent that the State did succeed in reducing the prison population by releasing the less dangerous inmates on Control Release, we find no impropriety. Therefore, for any time-frames in which the prison population did not exceed the relevant percentage thresholds, the Department need provide no relief.[13] While we recognize that it may be impossible to calculate the

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[12] The Supreme Court seems to have indicated in Lynce that had the State been able to release other less dangerous inmates and therefore avoid the occurrence of the requisite levels of prison overcrowding, it might have avoided the necessity of releasing the more dangerous inmates pursuant to the prior statutes. It stated:

> The State, after all, could have alleviated the overcrowding problem in various ways: It could have built more prisons; it could have paroled a large category of nonviolent offenders; or it might have discontinued prosecution of some classes of victimless crimes.

Lynce, 519 U.S. at 446 (emphasis added).

[13] The Department must ensure, however, that its calculations have been made based on the relevant definition of prison overcrowding, as discussed below.

exact amount of prison overcrowding and the exact number of credits that would have been issued to the petitioners nearly a decade ago had the State utilized the overcrowding statutes in effect at the time of each inmate's offense, we believe this opinion sets forth sufficient guidelines so that the Department may endeavor to calculate a reasonable estimate of the relief now due to each inmate.

The petitioners also argue that for the years in which Control Release allotments were awarded they should receive the much higher number of Control Release allotments that were given to the Control Release eligible inmates. We conclude that under the Ex Post Facto Clause, the petitioners are only entitled to the number of credits that should have been awarded under the prior statutes, not what other inmates were actually awarded under the Control Release program. To do otherwise would result in an undue windfall for the petitioners.[14]

The petitioners also argue that those inmates who were only eligible for Emergency Gain Time at the time of their offenses should be awarded continuing amounts of early release credits totaling much more than the amount determinable by the Emergency Gain Time statute itself. See § 944.598, Fla. Stat. (1983-Supp. 1992). We disagree.

According to subsections (1) and (2) of section 944.598, when the threshold level was surpassed, the Secretary was given authority to award up to thirty days Emergency Gain Time, in five-day increments, to the entire eligible inmate population. Subsection (2), however, makes clear that these "across-the-board" awards were limited to a certain period of time. If after fifteen days overcrowding continued despite the awards made under subsection (2), subsection (3) became activated.[15] Under

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[14] In addition, even if an inmate is eligible for more than one type of credit, that inmate should not be awarded duplicate (or double) credits for the same time period.

[15] The time-restricted authority under section 944.598(2) contrasts with the

subsection (3), prison overcrowding was further alleviated by awarding credits to a different, more limited group of inmates. These inmates would then be placed on "compulsory conditional release." If an inmate was eligible for Emergency Gain Time under subsection (2), but was not eligible for continuing awards under subsection (3), then that inmate would be limited to the amount of credits awardable under subsection (2).

We believe that the United States Supreme Court's somewhat different interpretation of that statute in Lynce v. Mathis, 519 U.S. 433, 448 n.18 (1997), was not intended to control the manner in which the appropriate remedy should be calculated (in fact, the Supreme Court did not mention subsection (3) at all). On the contrary, the Supreme Court's discussion of that statute was merely a reaffirmation of the "core Ex Post Facto" argument that all the later overcrowding statutes were really the same, at least for purposes of deciding whether a later statute was merely a "revamping" of the prior statute. In other words, we believe that the Supreme Court's discussion of that statute was only meant to reject the Department of Corrections' assertions in that case that all the separate overcrowding statutes had nothing to do with each other and that an inmate's entitlement to overcrowding credits under one statute terminated upon the enactment of a new statute.

There is one final issue that must be addressed before the State can calculate the exact number of credits due to each inmate. That issue concerns the three different definitions of prison overcrowding. Prison overcrowding occurs when the prison population exceeds the "lawful capacity" of the prison system.[16] Under all the overcrowding statutes, the award of

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later overcrowding statutes which specifically provided the State with continuing authority to award credits "across-the board" until the prison population fell below a certain percentage threshold. See § 944.276(2), Fla. Stat. (1987)(Administrative Gain Time); § 944.277(2), Fla. Stat. (Supp. 1988)(Provisional Credits); § 947.146(2), Fla. Stat. (1989)(Control Release).

[16] The term "lawful capacity" was later changed to "total capacity" in 1995.

credits was activated when the prison population exceeded the relevant percentage (either 97.5%, 98%, or 99%) of "lawful capacity." "Lawful capacity," however, was defined differently during various time periods. When the Emergency Gain Time statute was first enacted in 1983, the statute defined "lawful capacity" as "the total capacity of all institutions and facilities in the prison system as determined either by the Legislature or by the courts." See § 944.598(7)(b), Fla. Stat. (1983). In 1983, however, the legislature had not actually determined an exact definition, nor had any court done so. As discussed above, in the early 1980s, the Department was embroiled in the Costello prison overcrowding lawsuit. According to the Costello settlement agreement, effective July 1, 1985, the definition of "lawful capacity" was determined to be 133% of total design capacity. See § 944.598(6)(b)(note 1), Fla. Stat. (Supp. 1992). Effective June 10, 1995, the definition was changed to 150%. See §§ 947.146 (2); 944.096(4) (b); 944.023(1)(b), Fla. Stat. (1995); ch. 95-251, §§ 1-6, at 2235-38, Laws of Fla.

The Department argues that it can change and apply retrospectively the definition of prison overcrowding by changing the percentage over which it is still "lawful" to exceed the total design capacity. The Department makes this assertion because it believes that it has always been understood that the definition of overcrowding could be changed. We cannot agree. We conclude that the definition of overcrowding, as it was defined at the time of the inmate's offense, is part and parcel of the relevant version of the overcrowding statute that should be applied to each inmate. We agree that the legislature may change the definition of prison overcrowding; however, since that change as proven by the Department's charts can drastically reduce or even eliminate the credits an inmate might have received under the prior definition, the Department cannot apply

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See §§ 947.146(2), 944.023(b), Fla. Stat. (1995); ch. 95-251, §§ 1-6, at 2235-38, Laws of Fla.

the definition retrospectively to inmates whose offenses were committed prior to the effective date of the change.

Accordingly, the first definition of "lawful capacity" applies to inmates whose offenses occurred on or after June 16, 1983, but before July 1, 1985. That definition does not apply to any of the petitioners in this case and thus, we decline to address it. The second definition is 133% of the total design capacity. That definition must be applied to inmates whose offenses were committed on or after July 1, 1985, but before June 10, 1995. See § 944.598(6)(b)(note 1), Fla. Stat. (Supp. 1992). Accordingly, it applies to these petitioners. The third definition is 150% of total design capacity.[17] This definition, however, cannot be applied to these petitioners as concerns Emergency Gain Time, Administrative Gain Time, and Provisional Credits. See §§ 947.146 (2); 944.096(4)(b); 944.023(1)(b), Fla. Stat. (1995); ch. 95-251, §§ 1-6, at 2235-38, Laws of Fla. Therefore, for each version of the pertinent overcrowding statute there is both a relevant percentage threshold (97.5%, 98%, 99%, 100%, etc.) over "lawful capacity" when the overcrowding statutes would activate, and there is a relevant definition of "lawful capacity" (either actual prison population, 133%, or 150%).

IV. Conclusion

Long before Lynce, the United States Supreme Court made clear in Weaver that, as concerns gain time, if a "new provision constricts the inmate's opportunity to earn early release, [it] thereby makes more onerous the punishment for crimes committed before its enactment [and] runs afoul of the prohibition against ex post facto laws." Weaver, 450 U.S. at 35-36. Lynce merely clarified that overcrowding credits must be treated the same as regular gain time. By retrospectively

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[17] The 150% definition contains certain exclusions. For example, medical and mental facilities must remain at or below design capacity, i.e., they may not exceed 100% of design capacity. See § 944.023(1)(b)(1-6), Fla. Stat. (1995).

subjecting the petitioners to the more restrictive eligibility requirements of the subsequently enacted Control Release program, the State effectively repealed the prior programs in effect at the time of the petitioners' offenses and severely curtailed the availability of such credits to the petitioners, in violation of both Weaver and Lynce. The State must now rectify its error.

We are cognizant of the tremendous effort the recalculation required under this opinion will entail on the part of the Department. Nevertheless, we believe this result is compelled by the decisions in Lynce and Weaver.

We are bound to follow the law as expressed by the United States Supreme Court. This Court has repeatedly accepted the State's view concerning retroactive legislation restricting gain time. Each of those times the United States Supreme Court vacated our decisions. See Weaver v. Graham, 376 So. 2d 855 (Fla. 1979), rev'd, 450 U.S. 24 (1981); Calamia v. Singletary, 686 So. 2d 1337 (Fla. 1996), vacated, 117 S. Ct. 1309 (1997); State v. Lancaster, 687 So. 2d 1299 (Fla. 1997), vacated, 118 S. Ct. 37 (1997). We are compelled, therefore, to grant the petitioners' petitions for writ of habeas corpus.[18] Because we trust that the State will fully comply with the dictates of this opinion, we withhold issuance of the writ.

It is so ordered.

HARDING, C.J., and SHAW and ANSTEAD, JJ., concur.
WELLS, J., dissents with an opinion.
PARIENTE, J., recused.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

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[18] The general relief to be accorded is reflected in Appendixes A and B. Inmates not parties to this action are generally bound by these appendixes but retain their right to challenge the applicability of the charts to their particular situations.

WELLS, J., dissenting.

I dissent in this case because I believe that the majority has unnecessarily and unreasonably extended the United States Supreme Court's decision in Lynce v. Mathis, 519 U.S. 433 (1997), far beyond that necessary to comply with that Court's mandate.

The majority erroneously ignores the question which the Supreme Court expressly states that it decided in Lynce:

> The question presented by this case is whether a 1992 statute canceling such credits for certain classes of offenders after they had been awarded–indeed, after they had resulted in the prisoners' release from custody–violates the Ex Post Facto Clause of the Federal Constitution.

Id. at 435 (emphasis added). Fundamental to a correct analysis is the recognition that Lynce and this case are patently factually distinguishable. Completely unlike the question presented in Lynce, here we have a situation in which the receipt of the subject credits was not only speculative at the time of the petitioners' offenses but they were simply never awarded. Since they were never awarded, they could not have been retroactively canceled. Furthermore, contrary to Lynce's situation, these prisoners were never released. Therefore, neither of the two essential factual components of Lynce (actual award and then actual release) are present.

The reason these two basic factual components were absent is that the petitioners were not in the custody of the Department at the time that such credits were being awarded.[19] To give the

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[19]As noted in the majority opinion, petitioner Hock was in custody during a portion of the relevant time frames and received some credits. However, he has already had those credits restored, and this case does not concern those credits.

petitioners prison overcrowding reduction credits when they were not even in prison during the time frame in which such credits were being awarded is to engage in a purely fictionalized scenario of what the petitioners might have received if they had been where they were not. I do not believe the United States Supreme Court intended for us to engage in such fantasy.

I am quite aware that the Supreme Court in Weaver v. Graham, 450 U.S. 24 (1981), held in respect to the earned gain-time statutes that a law need not impair a "vested right" in order to violate the ex post facto prohibition. This clearly comports with reason in respect to the availability of earned gain time. As the United States Supreme Court wrote, a prisoner is "disadvantaged by the reduced opportunity to shorten his time in prison simply through good conduct." Id. at 33-34. However, contrary to the majority's reflexive reaction, I am not persuaded that the United States Supreme Court's decision in Lynce forces an illogical equating of earned gain-time credits and unpredictable prison overcrowding credits for every ex post facto analysis purpose. Rather, the United States Supreme Court merely said that the motivation of the legislature in passing the various gain-time statutes was immaterial for purposes of ex post facto analysis. 519 U.S. at 442. This should not be translated to mean that every person who ultimately ends up in the prison system is entitled to the benefit of such credits regardless of that person's actual factual circumstances.

While the Supreme Court's decision in Lynce and its reversal in Calamia v. Singletary, 117 S. Ct. 733 (Fla. 1997), of this Court's decision in Calamia v. Singletary, 686 So. 2d 1337 (Fla. 1996), may have eliminated the distinction between such credits after they have been awarded, this simply does not require the conclusion that there is no longer any distinction between such credits even before they have been awarded. Obviously, the credits in Lynce's situation were no longer speculative since the credits had been specifically in his records, were awarded to him, and had been acted upon to release Lynce. Lynce was not really a decision about a prisoner's "opportunities" for early release but

rather a decision about the retroactive cancellation of something which was no longer speculative. As the Supreme Court noted, the question concerned the "fact that [Lynce] was actually awarded 1,860 days of provisional credits and the fact that those credits were retroactively canceled." Lynce, 519 U.S. at 446. In other words, I believe Lynce should be read to say that while a prisoner may not have a right to expect something before he has it because it is speculative, after he receives it and uses it to attain his liberty, it is no longer speculative. Again, I would point to the two essential parts of the Supreme Court's question: whether an ex post facto violation occurs when there is (1) an actual award of credits; and (2) actual release from custody based on those credits. We simply do not have either of those two necessary elements in this case. Accordingly, there can be no violation.

Even after Lynce, several courts have indicated that a proper ex post facto analysis still includes a determination of whether the sought-after early release opportunity is or was "speculative." In Hallmark v. Johnson, 118 F.3d 1073 (5th Cir.), cert. denied, 118 S. Ct. 576 (1997), for example, the court concluded that although the new gain-time provision at issue there had the potential to constrict the petitioners' opportunities for early release to some degree, that contingency would only occur if and when a number of additional speculative variables came into fruition. Accordingly, the court found no ex post facto violation. In Wootlin v. Fleming, 136 F.3d 1032 (5th Cir. 1998), the court found that since Wootlin's eligibility for early release had always been subject to the discretion of prison officials, his opportunity for release had been speculative from the beginning. The prison officials' determination that they would not exercise their discretion for violent offenders like Wootlin did little to Wootlin's hope for release since he might never have been chosen for release under the previous policy. Id. at 1037. Accordingly, as in Hallmark, the court found no ex post facto violation.

The Supreme Court seems to have recognized in Lynce itself that the "speculative" component expounded upon in California Department of Corrections v. Morales, 514 U.S. 499, 506-513 (1995), remains intact when it reasoned that "[i]n this case, unlike in Morales, the actual course of events makes it unnecessary to speculate about what might have happened." Lynce, 519 U.S. at 446. In Morales, the petitioner's chances of receiving parole had always been subject to the discretion of the parole board. Since Morales was serving sentences for several murder convictions, his chances for early release had never been very good. A later change in the parole rules extending the time period between parole considerations for persons convicted of more than one murder did little to change Morales' chances for early release. The Supreme Court found the rule changes had only a speculative effect on Morales and concluded that such changes do not violate the Ex Post Facto Clause. Morales, 514 U.S. at 507-509, 518.

I believe that the same conclusion should apply to this case. In this case, all of the petitioners committed their offenses while the emergency gain time statute was in existence. However, that statute could not go into effect until the Secretary of the Department of Corrections both certified certain information concerning the prison population and prison capacity and advised the Governor of the existence of a state of emergency. See § 944.598(1), Fla. Stat. (1983-Supp. 1992). At that point, the Governor would certify the above information by letter. Id. Only then could the Secretary of the Department of Corrections actually declare a state of emergency. Id. However, even at that point, the award of credits was discretionary on the part of the Secretary. Id.

The Department of Corrections has provided information indicating that no such state of emergency was ever declared. Accordingly, the requisite preconditions never occurred, and the statute never went into effect. The declaration of a state of emergency was a necessary condition or contingency. This contingency was speculative at the time of the petitioners'

offenses, and it never occurred. Furthermore, these inmates never even received the "substitute" credit that Lynce received.[20] Accordingly, all necessary contingencies failed to come into fruition. Thus, contrary to the situation in Lynce, the sought-after early release opportunity never materialized for these inmates. The fact that other credits actually materialized for other inmates should not be allowed to substitute for the requisite concreteness necessary to find an ex post facto violation.[21]

Some of the petitioners claim credits under several of the later-enacted overcrowding statutes administered by the Department, as discussed in detail in the majority opinion. While these statutes did not require a declaration of a state of emergency, they did require a certification from the Secretary that the pertinent prison capacity level had been reached. At that point, the Secretary was given discretion to award credits. See § 944.276(1), Fla. Stat. (1987) (administrative gain time); § 944.277(1), Fla. Stat. (Supp. 1988-Supp. 1992) (provisional credits). In hindsight, we know that the Secretary did actually award credits to a number of inmates. However, he never awarded credits to these inmates. Again, I do not think Lynce requires that we excuse the fact that credits never materialized for these inmates by pointing to other inmates who actually received credits.

In sum, while I understand that the majority concludes that it is compelled to grant these petitions, having been reversed in other gain-time cases by the Supreme Court, I believe that this

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[20]While Lynce was eligible at the time of his offense for only emergency gain time and never received that particular type of overcrowding credit, he eventually did receive another type of overcrowding credit (provisional credits). The Supreme Court concluded that for ex post facto purposes the statutes were essentially the same. 519 U.S. at 449 (noting that "[t]he changes in the series of statutes authorizing the award of overcrowding gain-time do not affect petitioner's core ex post facto claim."

[21]Petitioner Hock did receive some "substitute" credits, however, as noted above, he has already had those credits restored.

reflexive reaction is inappropriate here because what is presented is clearly distinguishable from Lynce.

Five Cases Consolidated:

Original Proceedings - Habeas Corpus

[names of counsel, etc. omitted]

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		-	-	-	-	-

Gomez Appendix B - Overcrowding Awards by Offender Group

Effective Date	Group 3[22]	Group 4[23]	Group 5[24]
06/30/1991			76 days
07/31/1991			109 days
10/31/1991			180 days
11/30/1991			172 days
04/30/1992			184 days
05/31/1993			220 days
06/30/1993		40 days	40 days
07/15/1993			
07/31/1993		16 days	16 days
08/31/1993		51 days	51 days
09/30/1993		32 days	32 days
10/31/1993		36 days	36 days
11/30/1993		51 days	51 days
12/31/1993		56 days	56 days
01/31/1994		36 days	36 days
02/28/1994		46 days	46 days
03/31/1994		32 days	32 days
04/28/1994	30 days		

[22] Group 3 includes offenders whose offenses were committed on or after June 2, 1986 but before June 17, 1993 (6/2/86-6/16/93) and who are eligible for Emergency Gain Time (at the 99 % threshold), but who are not eligible for Administrative Gain time, Provisional Credits, or Control Release.

[23] Group 4 includes offenders whose offenses were committed on or after February 5, 1987 but before July 1, 1988 (2/5/87-6/30/88) and who are eligible for Administrative Gain Time (at the 98% threshold), but who are not eligible for Provisional Credits or Control Release.

[24] Group 5 includes offenders whose offenses were committed on or after July 1, 1988 but before September 1, 1990 (7/1/88-8/31/90) and who are eligible for Provisional Credits at the 97.5% threshold), but who are not eligible for Control Release.

05/13/1994	*30 days		
04/30/1994		34 days	34 days
05/31/1994		26 days	26 days
06/30/1994		33 days	33 days
07/31/1994		28 days	28 days
08/31/1994		48 days	48 days
09/30/1994		30 days	30 days
10/31/1994		37 days	37 days
11/30/1994		42 days	42 days
12/31/1994		37 days	37 days
01/31/1995		37 days	37 days
02/28/1995		37 days	37 days
03/31/1995		37 days	37 days
06/30/1995			1 day
08/31/1995			20 days
09/30/1995			25 days
10/31/1995			20 days
11/30/1995			1 day
Total	**60 days**	**822 days**	**1830 days**

*Assuming Offender meets criteria under section 944.598(3), Florida Statutes (Supp. 1986).

[PETITIONER'S APPENDIX B]

Florida Statutes

Section 944.598 (1983) [excerpt]

944.598 Emergency release of prisoners.--

(1) The Department of Corrections shall advise the Governor of the existence of a state of emergency in the state correctional system whenever the population of the state correctional system exceeds 98 percent of the lawful capacity of the system for males or females, or both. In conveying this information, the secretary of the department shall certify the rated design capacity, maximum capacity, lawful capacity, system maximum capacity, and current population of the state correctional system. When the Governor verifies such certification by letter, the secretary shall declare a state of emergency.

(2) Following the declaration of a state of emergency, the sentences of all inmates in the system who are eligible to earn gain-time shall be reduced by the credit of up to 30 days gain-time, in 5-day increments, as may be necessary to reduce the inmate population to 97 percent of lawful capacity of the system.

* * *

(7) As used in this section, the term:
(a) "State correctional system" means the system as defined in s. 944.02.
(b) "Lawful capacity" of the state correctional system means the total capacity of all institutions and facilities in the prison system as determined either by the Legislature or by the courts.

History.--ss. 3, 5, ch. 83-131.

Section 944.276 (1987) [excerpt]

[1]944.276 Administrative gain-time.--

(1) Whenever the inmate population of the correctional system reaches 98 percent of lawful capacity as defined in s. 944.598, the secretary of the Department of Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such certification in writing, the secretary may grant up to a maximum of 60 days administrative gain-time, equally to all inmates who are earning incentive gain-time, unless such inmates:

* * *

(2) The authority granted to the secretary shall continue until the inmate population of the correctional system reaches 97 percent of lawful capacity, at which time the authority granted to the secretary shall cease, and the secretary shall notify the Governor in writing of the cessation of such authority.

History.--ss. 1, 2, ch. 87-2

[1]Note.--Expires effective July 1, 1988, pursuant to s.2, ch. 87-2, and is scheduled for review by the Legislature before that date.

Section 944.277 (Supp. 1988) [excerpt]

944.277 Provisional credits.--

(1) Whenever the inmate population of the correctional system reaches 97.5 percent of lawful capacity as defined in s. 944.096, the Secretary of Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such condition in writing, the secretary may grant up to 60 days of

provisional credits equally to each inmate who is earning incentive gain-time, except to an inmate who:

* * *

(2) The secretary's authority to grant provisional credits in increments not exceeding 60 days will continue until the inmate population of the correctional system reaches 97 percent of lawful capacity, at which time the authority granted to the secretary will cease, and the secretary shall notify the Governor in writing of the cessation of such authority.

* * *

History.--s. 5, ch. 88-122

Section 944.278 (1997) [not changed from 1993 enactment]

944.278 Cancellation of administrative gain-time and provisional credits.–

All awards of administrative gain-time under [1]s. 944.276 and provisional credits under [2]s. 944.277 are hereby canceled for all inmates serving a sentence or combined sentences in the custody of the department, or serving a state sentence in the custody of another jurisdiction. Release dates of all inmates with 1 or more days of such awards shall be extended by the length of time equal to the number of days of administrative gain-time and provisional credits which were canceled. Inmates who are out of custody due to an escape or a release on bond, or whose postrelease supervision is revoked on or after the effective date of this act, shall have all administrative gain-time and provisional credits canceled when the inmate's release date is reestablished upon return to custody. Offenders who are under

provisional release supervision as of the effective date of this section shall be subject to the terms and conditions established at the time of release until such offenders have been discharged from supervision. Offenders who have warrants outstanding based on violation of supervision as of the effective date of this section, or who violate terms of supervision subsequent to enactment of this section, shall be terminated from supervision and returned to custody. All provisional credits shall be canceled when an offender's tentative release date is reestablished.

History.–s. 35, ch. 93-406.
[1]**Note.**–Repealed by s. 6, ch. 88-122.
[2]**Note.**–Repealed by s. 32, ch. 93-406.

Section 947.146 [as amended through 1998]

947.146 Control Release Authority.–
(1) There is created a Control Release Authority which shall be composed of the members of the Parole Commission and which shall have the same chair as the commission. The authority shall utilize such commission staff as it determines is necessary to carry out its purposes.
(2) The authority shall implement a system for determining the number and type of inmates who must be released into the community under control release in order to maintain the state prison system between 99 and 100 percent of its total capacity as defined in s. 944.023. No inmate has a right to control release. Control release is an administrative function solely used to manage the state prison population within total capacity. An inmate may not receive an advancement of his or her control release date by an award of control release allotments for any period of time before the date the inmate becomes statutorily eligible for control release or before the subsequent date of establishment of the inmate's advanceable control release date.

(3) Within 120 days prior to the date the state correctional system is projected pursuant to s. 216.136 to exceed 99 percent of total capacity, the authority shall determine eligibility for and establish a control release date for an appropriate number of parole ineligible inmates committed to the department and incarcerated within the state who have been determined by the authority to be eligible for discretionary early release pursuant to this section. In establishing control release dates, it is the intent of the Legislature that the authority prioritize consideration of eligible inmates closest to their tentative release date. The authority shall rely upon commitment data on the offender information system maintained by the department to initially identify inmates who are to be reviewed for control release consideration. The authority may use a method of objective risk assessment in determining if an eligible inmate should be released. Such assessment shall be a part of the department's management information system. However, the authority shall have sole responsibility for determining control release eligibility, establishing a control release date, and effectuating the release of a sufficient number of inmates to maintain the inmate population between 99 percent and 100 percent of total capacity. Inmates who are ineligible for control release are inmates who are parole eligible or inmates who:

* * *

In making control release eligibility determinations under this subsection, the authority may rely on any document leading to or generated during the course of the criminal proceedings, including, but not limited to, any presentence or postsentence investigation or any information contained in arrest reports relating to circumstances of the offense.

(4) Control release dates shall be based upon a system of uniform criteria which shall include, but not be limited to, present offenses for which the person is committed, past criminal

conduct, length of cumulative sentences, and age of the offender at the time of commitment, together with any aggravating or mitigating circumstances.

(5) Whenever the inmate population drops below 99 percent of total capacity and remains below 99 percent for 90 consecutive days without requiring the release of inmates under this section, all control release dates shall become void and no inmate shall be eligible for release under any previously established control release date. An inmate shall not have a right to a control release date, nor shall the authority be required to establish or reestablish any additional control release dates except under the provisions of subsection (2).

(6) For purpose of determining eligibility for control release, the mandatory minimum portion of a concurrent sentence will begin on the date the sentence begins to run as provided in s. 921.161. The mandatory minimum portions of consecutive sentences shall be served at the beginning of the maximum sentence as established by the Department of Corrections. With respect to offenders who have more than one sentence with a mandatory minimum portion, each mandatory minimum portion of consecutive sentences shall be served consecutively; provided, that in no case shall a sentence begin to run before the date of imposition of that sentence.

(7) The authority has the power and duty to:

(a) Extend or advance the control release date of any inmate for whom a date has been established pursuant to subsection (2), based upon one or more of the following:

1. Recently discovered information of:

a. Past criminal conduct;

b. Verified threats by inmates provided by victims, law enforcement, or the department;

c. Potential risk to or vulnerability of a victim;

d. Psychological or physical trauma to the victim due to the criminal offense;

e. Court-ordered restitution;

f. History of abuse or addiction to a chemical substance verified by a presentence or postsentence investigation report;
g. The inmate's ties to organized crime;
h. A change in the inmate's sentence structure;
i. Cooperation with law enforcement;
j. Strong community support; and
k. A documented mental condition as a factor for future criminal behavior.
2. The recommendation of the department regarding:
a. A medical or mental health-related condition; or
b. Institutional adjustment of the inmate, which may include refusal by the inmate to sign the agreement to the conditions of the release plan.
3. Total capacity of the state prison system.
(b) Authorize an individual commissioner to postpone a control release date for not more than 60 days without a hearing for any inmate who has become the subject of a disciplinary proceeding, a criminal arrest, an information, or an indictment; who has been terminated from work release; or about whom there is any recently discovered information as specified in paragraph (a).
(c) Determine the terms, conditions, and period of time of control release for persons released pursuant to this section.
(d) Determine violations of control release and what actions shall be taken with reference thereto.
(e) Provide for victim input into the decisionmaking process which may be used by the authority as aggravation or mitigation in determining which persons shall be released on control release.
(f) Make such investigations as may be necessary for the purposes of establishing, modifying, or revoking a control release date.
(g) Contract with a public defender or private counsel for representation of indigent persons charged with violating the terms of control release.

(h) Adopt such rules as the authority deems necessary for implementation of the provisions of this section.

(8) The Department of Corrections shall select and contract with public or private organizations for the provision of basic support services for inmates whose term of control release supervision does not exceed 180 days. Basic support services shall include, but not be limited to, substance abuse counseling, temporary housing, family counseling, and employment support programs.

(9) The authority shall examine such records as it deems necessary of the department, the [1]Department of Health and Rehabilitative Services, the Department of Law Enforcement, and any other such agency for the purpose of either establishing, modifying, or revoking a control release date. The victim impact statement shall be included in such records for examination. Such agencies shall provide the information requested by the authority for the purposes of fulfilling the requirements of this section.

(10) The authority shall adopt as a standard condition for all persons released pursuant to this section that such persons shall not commit a violation which constitutes a felony. The authority shall determine the appropriate terms, conditions, and lengths of supervision, if any, for persons placed on control release, except that such lengths of supervision shall be determined as provided in s. 947.24 and may not exceed the maximum period for which the person has been sentenced. If the person's conviction was for a controlled substance violation, the conditions must include a requirement that the person submit to random substance abuse testing intermittently throughout the term of supervision, and, when warranted, a requirement that the person participate in substance abuse assessment and substance abuse treatment services upon the direction of the correctional probation officer as defined in s. 943.10(3). Effective July 1, 1994, and applicable for offenses committed on or after that date, the authority may require, as a condition of control release, that the control releasee make payment of the debt due and owing to a county or

municipal detention facility under s. 951.032 for medical care, treatment, hospitalization, or transportation received by the releasee while in that detention facility. The authority, in determining whether to order such repayment and the amount of such repayment, shall consider the amount of the debt, whether there was any fault of the institution for the medical expenses incurred, the financial resources of the releasee, the present and potential future financial needs and earning ability of the releasee, and dependents, and other appropriate factors. If any inmate placed on control release supervision is also subject to probation or community control, the department shall supervise such person according to the conditions imposed by the court, and the authority shall defer to such supervision. If the court revokes the probation or community control, the authority, as the result of the revocation, may vacate the grant of control release and resulting deferred control release supervision or take other action it considers appropriate. If the term of control release supervision exceeds that of the probation or community control, then supervision shall revert to the authority's conditions upon expiration of the probation or community control.

(11) If an inmate is released on control release supervision subject to a detainer for a pending charge and the pending charge results in a new commitment to incarceration before expiration of the terms of control release supervision, the authority may vacate the grant of control release and the control release supervision or take other action it considers appropriate.

(12) When the authority has reasonable grounds to believe that an offender released under this section has violated the terms and conditions of control release, such offender shall be subject to the provisions of s. 947.141 and shall be subject to forfeiture of gain-time pursuant to s. 944.28(1).

(13) If it is discovered that any control releasee was placed on control release by error or while statutorily ineligible for such release, the order of control release may be vacated and the Control Release Authority may cause a warrant to be issued for

the arrest and return of the control releasee to the custody of the Department of Corrections for service of the unserved portion of the sentence or combined sentences.

(14) Effective July 1, 1996, all control release dates established prior to such date become void and no inmate shall be eligible for release under any previously established control release date. Offenders who are under control release supervision as of July 1, 1996, shall be subject to the conditions established by the authority until such offenders have been discharged from supervision. Offenders who have warrants outstanding based on violation of supervision as of July 1, 1996, or who violate the terms of their supervision subsequent to July 1, 1996, shall be subject to the provisions of s. 947.141.

History.–s. 2, ch. 89-526; s. 3, ch. 90-77; s. 2, ch. 90-186; s. 7, ch. 90-211; s. 12, ch. 90-337; s. 11, ch. 91-280; s. 15, ch. 92-310; s. 6, ch. 93-61; s. 27, ch. 93-406; s. 1, ch. 94-111; s. 2, ch. 94-121; s. 2, ch. 94-294; s. 27, ch. 95-184; s. 4, ch. 95-251; s. 19, ch. 96-422; s. 1873, ch. 97-102; s. 31, ch. 97-194; s. 8, ch. 98-417.

[1]Note.–The Department of Health and Rehabilitative Services was redesignated as the Department of Children and Family Services by s. 5, ch. 96-403, and the Department of Health was created by s. 8, ch. 96-403.